AIWA CO LTD & ANOR

v.

AIWA INDUSTRIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[CIVIL SUIT NO: D1-22-601-1996]
15 NOVEMBER 1996

CIVIL PROCEDURE: *Injunction - Interlocutory injunction to restrain acts of passing-off - Balance of convenience in whose favour*

CIVIL PROCEDURE: *Counsel appearing in court - Counsel for defendant left before hearing - Whether action showed lack of interest in application*

CIVIL PROCEDURE: *Adjournment - Application for - Application made two days before hearing - Whether too late - Whether request for adjournment must give reasons for late application - Factors to be considered*

The 1st plaintiff was the manufacturer and retailer of electrical goods bearing the trademarks 'Aiwa' with a thunderbolt and 'Aiwa' in Japan ('the trademarks'), of which trademarks it was the registered proprietor. The 2nd plaintiff, Aiwa Electronics (Malaysia) Sdn Bhd, was established by the first plaintiff to manufacture and distribute electrical goods under the trademarks in Malaysia. The plaintiffs averred that the 1st defendant was manufacturing and distributing electrical goods bearing the trademarks without their authority or licence, and that the 2nd and 3rd defendants, Razak bin Abu Bakar and Hassan bin Abdul Majid, respectively, were the first directors and present shareholders of the 1st defendant, while the 4th defendant, Lim Beng Huan, was its managing director. The plaintiffs complained that the defendants had therefore committed acts of passing-off in relation to the goods sold by them and had infringed the plaintiffs' trademark. On 27 September 1996, the plaintiffs applied for an interlocutory injunction to restrain the defendants from further committing such acts which were misleading the public into believing that the goods sold by the defendants were those of the plaintiffs' and which were causing loss to the plaintiffs in terms of their business reputation and good name.

On 18 October 1996, counsel for the 1st and 4th defendants applied to have the matter transferred to the High Court in Penang and for all proceedings to be stayed pending the hearing of their application. The application was set down for hearing on 15 November 1996. On 13 November 1996, the court received a facsimile transmission from the 1st and 4th defendants requesting

an adjournment of the 15 November 1996 hearing on the ground that the lawyer handling the matter had a full trial before the High Court in Ipoh on the same date. The court refused the application for an adjournment and counsel was informed accordingly. On 15 November 1996, a lawyer from the defendants' counsel's firm appeared for the 1st and 4th defendants but informed the court that she had no instructions to attend to the hearing of the applications for the injunction nor the transfer of proceedings, and asked for permission to leave the court chambers. The court informed her that the application for the injunction would be proceeded with as an *inter partes* application and that she was at liberty to leave if she so wished, which she did. The 2nd and 3rd defendants did not appear at the hearing.

Held:

[1] The defendants' counsel's application for the adjournment was refused, having taken into account, *inter alia,* the nature of the urgent relief sought by the plaintiffs, the fact that the defendants' application for transfer of proceedings requested for all proceedings, which included the plaintiffs' application for an interlocutory injunction to be stayed pending disposal of the application, the failure to give any explanation why the request for an adjournment was made at the last minute, when in all likelihood the hearing in Ipoh would have been set down much earlier, and that there were more than 12 advocates and solicitors in the firm who were competent to appear at the hearing. It appeared that the solicitors had scant regard for the urgent nature of the plaintiffs' application.

[2] Owing to the failure of the defendants or their solicitors to attend the hearing on 15 November 1996, the court dismissed their application for a transfer of the proceedings with costs under O. 32 r. 5(1) of the Rules of the High Court 1980. Furthermore, as the lawyer from the 1st and 4th defendants' counsel's firm had thought it fit to leave the court before the matter could be heard, the court could only assume that the defendants were not interested in pursuing the application.

[3] In the absence of any evidence to the contrary, the plaintiffs had made out an arguable case for the granting of an interlocutory injunction and the balance of convenience was in their favour. Furthermore, the defendants had not filed an affidavit in reply despite repeated requests from the plaintiffs' solicitors to do so. As such, there were grounds to justify the granting of the interlocutory injunction subject to the usual undertaking as to damages.

[Plaintiffs' application allowed; defendants' application dismissed.]

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 5(1)

For the plaintiffs - Michael CM Soo & G Geetha; M/s Shook Lin & Bok
For the 1st & 4th defendants - Tan Pheck San; M/s Lim Kean Siew & Co
For the 2nd & 3rd defendants - Absent

Reported by Anne Khoo

JUDGMENT

T Selventhiranathan J:

It is averred in the statement of claim that the first plaintiff manufactures and sells a wide range of electrical goods bearing the trademarks "AIWA" with a thunderbolt and "aiwa" in Japan ('the trademarks'), and had by itself as well as through its subsidiary and/or associated companies sold such goods worldwide, including in Malaysia and Singapore.

It is also averred that the second plaintiff was established by the first plaintiff in May 1989 and authorised to carry on the business of manufacturing and distributing a wide range of electrical goods under the same trademarks in Malaysia, of which trademarks the first plaintiff is the registered proprietor.

The plaintiffs aver further that the first defendant company is carrying on the business of manufacturing and distributing electrical goods bearing the trademarks without their authority or licence, and that the second and third defendants are among the promoters, first directors and present shareholders of the first defendant while the fourth defendant is its managing director and/or chief executive.

The plaintiffs complain that the defendants had in the circumstances committed acts of passing-off in relation to the electrical goods manaufactured and sold by them and also infringed the plaintiffs' trademarks. The plaintiffs therefore applied for an interlocutory injunction *vide* encl. (5) to restrain the defendants from committing such acts.

Briefly, by their application in encl. (5) the plaintiffs sought to, *inter alia*, restrain the defendants from committing infringements of their trademarks and from passing-off the electrical goods manufactured by the first defendant as those of the plaintiffs, which actions were dishonest and calculated to deceive the purchasing public (please refer to encls. (5) and (1) for a detailed description of the reliefs sought).

The application in encl. (5) was filed on 27 September 1996. It was accompanied by a certificate of urgency under the hand of Encik Michael CM Soo, of counsel for the plaintiffs. The certificate was a condensation of the affidavit in encl. (4) in support of the application. The affidavit was affirmed by one Takashi Okada, the general manager of the legal and intellectual property division of the first plaintiff in Japan. He stated that the interlocutory injunction was necessary to restrain the defendants from infringing the plaintiffs' trademarks and from misleading the public into believing that the electrical goods manufactured and sold by the defendants were those of the plaintiffs. He further stated that the wrongful acts of the defendants had caused loss to the plaintiffs in terms of their business reputation and good name in Malaysia and other countries which could not be restored or recompensed. The application was supported further by the affidavit in encl. (9) of one Suzanne Vasylionis, a corporate researcher by profession based in Hong Kong, who averred that the first defendant is the manufacturer of electrical goods bearing the "AIWA" trademark and that a company called Emico Marketing Sdn. Bhd. was concerned with the sales and marketing of those goods, as revealed by her visit on 5 June 1996 to the showroom of Emico Marketing Sdn. Bhd. at 526 Jalan Tuanku Abdul Rahman, 55100 Kuala Lumpur.

The return date of the hearing of the application in encl. (5) was fixed for 7 October 1996. On that date, Encik Michael Soo appeared for the plaintiffs and also mentioned the matter on behalf of counsel for the first, third and fourth defendants. The second defendant did not appear and was not represented although he had been served with process of court. Encik Soo informed the court that counsel for the first and fourth defendants as well as counsel for the third defendant requested for more time to file these defendants' affidavits in reply to the plaintiffs' affidavits which had been served on them on 3 October 1996. The plaintiffs did not object to this request and the matter was adjourned to 15 November 1996 for hearing.

On 18 October 1996, Messrs Lim Kean Siew & Co. of Penang, acting on behalf of the first and fourth defendants, filed an application *vide* encl. (8) for this action to be transferred to the High court at Penang and for all interlocutory proceedings, including the plaintiffs' application in encl. (5), to be stayed pending the hearing of their application for transfer. The application for transfer was also set down for hearing for 15 November 1996.

On 13 November 1996 at 1637 hours (4.37pm) the court received, with reference to this action, a facsimile transmission on the letterhead of Messrs Lim Kean Siew & Co. as follows:

Kami merujuk kepada perkara di atas di mana kami mewakili pihak defendan pertama dan keempat.

Kami merujuk kepada lampiran 5 dan juga lampiran 15 yang kedua-duanya ditetapkan untuk perbicaraan pada 15hb November 1996. Di sini kami ingin memohon satu penangguhan perbicaraan kedua-dua lampiran tersebut kerana peguam kami yang mengendalikan kes ini, Encik Gerard Chan, terpaksa menghadiri Mahkamah Tinggi Ipoh untuk perbicaraan penuh bersama dengan Encik Lim Kean Chye (yang bertindak sebagai "senior counsel") dalam kes 23-167-88. Kes ini telah ditetapkan untuk perbicaraan pada 3 hari dari 14hb ke 16hb 1996 (*sic*).

Sila kemukakan permintaan kami kepada Yang Arif Hakim yang berkenaan untuk keputusannya.

Yang benar

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(The reference to lampiran (15) in the above facsimile transmission was clearly incorrect as the last enclosure in the file up to then was encl. (9). The reference should have been to lampiran (8)).

This fascimile transmission was brought to my attention on the morning of 14 November 1996 for directions whereupon I minuted on it to the deputy registrar of the court as follows:

Peguam lain boleh uruskan perbicaraan di hadapan saya. Penangguhan tidak dibenarkan.

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14/11/96

The deputy registrar informed the solicitors concerned accordingly.

My direction refusing the adjournment took into account the following factors:

(a) the nature of the urgent relief sought by the plaintiffs in the prevailing circumstances;

(b) the fact that more than a month had elapsed since the last adjourned hearing date on 7 October 1996;

(c) that the present request for an adjournment did not condescend to give any explanation as to why the request was being made at the eleventh hour when in all likelihood the trial of the case in the High court at Ipoh would have been fixed much earlier and parties informed accordingly to enable witnesses to be called;

(d) the fact that the letterhead of Messrs Lim Kean Siew & Co. revealed that the firm has no less than twelve other persons listed as practising advocates and solicitors, anyone of whom was competent to appear in place of Encik Gerard Chan for the hearing of the two applications on 15 November 1996;

and

(e) that the first and fourth defendants had applied for a transfer of this action to the High Court at Penang *vide* encl. (8) (which application was also set down for hearing on 15 November 1996) and wanted all proceedings, including the plaintiffs' application for an interlocutory injunction, to be stayed until their application was heard and disposed of.

On the morning of 15 November 1996 one Cik PS Tan appeared for the hearing of the plaintiffs' application in encl. (5) and the first and fourth defendants' application in encl. (8). She purported to mention the matter on behalf of the counsel for the first and fourth defendants. She informed the court that the counsel concerned, Encik Gerard Chan, was engaged in the High Court at Ipoh and referred to the facsimile transmission asking for an adjournment.

Cik Tan, and Cik G Geetha who appeared for the plaintiffs, were informed that the request for the adjournment had already been refused and the parties had been informed accordingly. To a question, Cik Tan confirmed that she was from the same firm of solicitors as Encik Gerard Chan, ie Messrs Lim Kean Siew & Co. (although the Court noted that her name does not appear on the firm's letterhead among the other twelve practising advocates and solicitors adverted to earlier).

Cik Geetha then informed the Court that the first and fourth defendants' application for the transfer of the proceedings to the High Court at Penang in encl. (8) had been **served** on the plaintiffs' solicitors only on **6 November 1996** (**although** the court noted that the **application was filed** on **18 October 1996** and **issued** out of the court registry **the same day**, and **put into the** said defendants' **solicitors' box** at the court premises **the same day** as evidenced by a stamp to that effect on the original copy of the application in the court file), and that the plaintiffs' affidavit to oppose the application for the transfer of the proceedings had been sent to their clients in Tokyo for affirmation on 8 November 1996 and had not been received back. She had a copy of the affidavit with her. In the circumstances she was not prepared for

the hearing of the application in encl. (8) for the transfer of the proceedings but could proceed with the hearing of the application by the plaintiffs in encl. (5) for the interlocutory injunction.

The court again refused the first and fourth defendants' solicitors' repeated request for a second adjournment of the hearing of encl. (5) and stood the matter down to 10.30am for Encik Michael Soo to appear as Cik Geetha informed the court that he was before another court in the same building and would make himself available at short notice. Cik Tan was also told to obtain any directions that she wished to obtain from her office.

When the court resumed with the hearing of this matter at 10.35am, Encik Michael Soo and Cik Geetha appeared for the plaintiffs with Cik PS Tan representing the first and fourth defendants. Encik Michael Soo informed the court that all the defendants had been served with the plaintiffs' application in encl. (5) and, except for the second defendant, were represented by solicitors. The second defendant had been served personally.

As the court was about to proceed to hear the application in encl. (5), Cik Tan said that since she had no instructions from Encik Gerard Chan to attend to the hearing of encls. (5) and (8), she asked for permission to leave the court chambers. She was thereupon informed that the court would proceed with the hearing of encl. (5) as an *inter partes* application but she was at liberty to leave the chambers if she so wished. She then left at 10.47am.

Encik Michael Soo then made his submission in relation to the application in encl. (5) which was supported by the affidavits adverted to earlier of Takashi Okada and Suzanne Vasylionis in encls. (4) and (9) respectively. He made detailed reference to the contents of the two affidavits and the facts therein which left the court in no doubt, in the absence of evidence to the contrary, that the plaintiffs had made out an arguable case for the granting of the interlocutory injunction sought and that the balance of convenience lay in favour of the plaintiffs and justified the making of the orders prayed for in encl. (5). Encik Michael Soo stressed that the defendants had filed no affidavit in reply despite a number of letters from the plaintiffs' solicitors requesting the defendants' solicitors to respond.

Based on the law and the authorities cited by Encik Michael Soo and applying the same to the facts of this case, (please see the notes of proceedings for details thereof), I made an order in terms of the plaintiffs' application in encl. (5), subject to the usual undertaking as to damages.

Encik Michael Soo then informed the court that a sealed copy of the first and fourth defendants' application in encl. (8) for the transfer of the proceedings was only served on the plaintiffs' solicitors on 6 November 1996 after he had written two letters asking for the same so that the plaintiffs' affidavit in reply could be finalised. He left the disposal of the application in encl. (8) to the discretion of the court. I dismissed that application with costs under O. 32 r. 5(1) of the Rules of the High Court 1980 owing to the failure of the defendants or their solicitors to attend the hearing thereof.

In refusing the first and fourth defendants' solicitors' request for an adjournment of the hearing of encls. (5) and (8), I wish to elaborate that I took into further consideration (in addition to the factors stated earlier in this judgment) the fact that the defendants had applied for the transfer of the proceedings to the High Court at Penang and, pending the hearing of their application for transfer, had applied for all proceedings, including the plaintiffs' application for an interlocutory injunction made upon a certificate of urgency, to be stayed. To my mind the solicitors for the first and fourth defendants had scant regard for the urgent nature of the plaintiffs' application, and bearing in mind the first and fourth defendants' application for the transfer of the proceedings, it could even be said that they were being dilatory. This is because they knew when they filed the application on 18 October 1996 for the transfer of the proceedings that the plaintiffs' application for the interlocutory injunction was set down for 15 November 1996 which was the same date as the return date for their transfer application. The court issued the sealed copy of the first and fourth defendants' transfer application the very same day it was filed and it was inserted into their solicitors' box [BC Box No: 099], as mentioned earlier, the very same day also. Yet the plaintiffs' solicitors had to go after the first and fourth defendants' solicitors repeatedly before they were served with the transfer application which the first and fourth defendants' solicitors knew full well was coming up for hearing on 15 November 1996.

For the reasons stated above, I was of the view that the conduct of the solicitors for the first and fourth defendants militated against my acceding to their request for an adjournment and that solicitors or counsel should take their work seriously and not make assumptions that the moment they write in for an adjournment, no matter how late and without giving satisfactory reasons therefor, it will be granted automatically or as a matter of course by the court, irrespective of whether their request is reasonable or not. I also wish to emphasise that the transfer application in encl. (8) was dismissed with costs because although Cik Tan was present initially during the proceedings she

thought it fit to leave before the matter could be heard. In the circumstances the court could only assume that the first and fourth defendants were not interested or were not serious in pursuing their application for the transfer of the proceedings to the High Court at Penang.